THE HON'BLE SRI JUSTICE BILAL NAZKI

AND

THE HON'BLE SRI JUSTICE G.CHANDRAIAH

WRIT PETITION NO.26249 OF 2005

08-02-2006

Between:

M/s Bio-Pharma Capsules … Petitioner

And

Deputy Commissioner of Commercial

Taxes … Respondent

THE HON'BLE SRI JUSTICE BILAL NAZKI

AND

THE HON'BLE SRI JUSTICE G.CHANDRAIAH

WRIT PETITION NO.26249 OF 2005

O R D E R (Per the Hon'ble Sri Bilal Nazki, J):

A short point is involved in this writ petition. Counter has been filed and we have heard learned counsel for the parties.

The petitioner claims to be dealing with empty gelatin capsules, which according to him are purchased from manufacturers outside the State. Thereafter, they are sold to the local manufacturers of drugs. The petitioner is an assessee of the sales tax. For the assessment year 2000-2001 he was assessed and the turnover relating to the empty capsules was subjected to 4% tax and the assessment order was passed on 19-10-2001. The assessment order for the year 2001-2002 was passed on 05-12-2002. The Commercial Tax Officer treated the sale of empty gelatin capsules for the year 2001-2002 as drugs and medicines falling under Entry-37 of the first schedule to the A.P.General Sales Tax Act, 1957 (for short "the Act") and subjected them to tax @10%. The petitioner challenged the assessment order by way of an appeal before the Appellate Deputy Commissioner. The appellate authority allowed the appeal and held that the empty gelatin capsules would fall under Entry-19 (iv) of the first schedule to the Act and would attract only 4% tax. Consequential to the appellate authority's order, the assessing authority made the final assessment order charging tax @4%. For the year 1999-2000 the assessing authority finalized the assessment levying tax @4%. The respondent, however, issued a notice proposing revision of the assessment order on the ground that the empty capsules were taxable @10% under Entry-37 of the first schedule to the Act. The petitioner filed his objections. After considering the objections, the respondent passed on order on 13-07-2004 accepting the case of the petitioner and dropping the proposed revision. For two years i.e. 2001-2002 and 1999-2000, the Department has accepted the plea of the petitioner-assessee that the empty capsules would attract tax @4% under Entry-19 (iv) of the first schedule to the Act, but for the year 2000-2001 they did not accept the plea although the assessing authority accepted the plea of the petitioner and passed an assessment order levying tax @4%. The respondent-Deputy Commissioner of Commercial Taxes issued a notice for revision and passed an order of revision and levied tax @12% under Entry-37 of the first schedule to the Act. He came to the conclusion that the empty capsules would not attract Entry-19 (iv) of the first schedule to the Act. The case of the petitioner is that for two years, one year being subsequent and one year being prior to the disputed year, the Department agreed with the assessee that the empty capsules would

attract tax @4% and surprisingly for one year they did not accept what they had already accepted for another two years. Even a *suo motu* revision was initiated and after explanation was given by the assessee, the proceedings of revision were dropped. In these circumstances, the respondent was not justified in levying tax @12% by the impugned order.

The learned Government Pleader submits that the writ petition is not maintainable and an appeal is available. He further submits that the empty capsules would attract tax @12% and not @4%. We are making it clear that we are not expressing any opinion as to whether the capsules in question would attract tax @4% or @12%, but the question which falls for consideration is whether the Department can take one stand for a particular year and another stand for another year with respect to the same commodity. The learned counsel appearing for the petitioner has drawn our attention to a judgment of the Supreme Court reported in ***Radhasoami Satsang v. Commissioner of Income-Tax.*** Almost a similar question was before the Supreme Court. In this judgment, it was held by the Supreme Court as follows:

> *"We are aware of the fact that, strictly speaking, res judicata does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year."*

Applying the principles laid down in the judgment of the Supreme Court, we feel that the Department should not have passed the impugned order, in view of the fact that the Department had accepted that the empty capsules would attract tax @4% in previous year and also in subsequent year with regard to the same assessee.

For the foregoing reasons, the impugned order is set aside and the writ petition is allowed. No order as to costs.

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(Bilal Nazki, J)

8th February, 2006

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(G.Chandraiah, J)

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